No. 508.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

GEORGE W. REED, Administrator with the will annexed of the Estate of Catherine M. Garcelon, deceased, and JAMES P. MERRITT,

Appellants,

vs.

JOHN A. STANLY, Trustee, etc., et al.,

Appellees.

THE APPELLANTS' BRIEF.

RODGERS, PATERSON & SLACK,

Counsel for Appellants

Note.

THE ORDER OF THE PAPERS IN THE TRANSCRIPT.

As originally filed, the bill of review had at the end, as "Exhibit A", the record of the original suit in which the decree sought be reviewed was made. In amending the bill the form used was "plaintiffs hereby amend all the bill * * * except "that part of the said bill designated therein as 'Exhibit A', so "as to read as follows", &c. (Tr. p. 231), so that, in the record on appeal, the "Exhibit A" precedes the body of the amended bill. The Clerk, in printing the Transcript, has followed the same order. The body of the bill of review extends from page 229 to page 285 of the Transcript, and so much of "Exhibit A" (the record of the original suit) of the bill as the Clerk has printed, extends from page 16 to page 228 of the Transcript.

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THE APPELLANTS' BRIEF.

(a) Statement of the Case.

This case is a bill of review upon the ground of error of law apparent on the face of the decree sought to be reviewed. The appeal is taken by the two plaint-

iffs from the decree of the Circuit Court for the Northern District of California (held by Hon. Thos. P. Hawley, District Judge), entered Sept. 29, 1898, dismissing the bill. (Tr. pp. 306–308; 321–323).

The decree appealed from was made upon an order sustaining three demurrers to the bill (Tr. pp. 302, 308). The three demurrers were by different defendants, but were identical in their grounds (Tr. pp. 286–301). The decree appealed from states as the sole ground upon which the demurrers were sustained and the bill dismissed, that

> "* * * the complainants herein have been "guilty of such laches and delay in the exhibi- "tion of the said bill of complaint, that they are "not entitled to the, or any of the relief prayed for "therein, and thereupon, because of the said laches "and delay of the said complainants, the Court "ordered that the said demurrers be sustained "and the said bill of complaint be dismissed with "costs." (Tr. p. 308).

In the opinion given on rendering the decree appealed from, it is stated by Judge Hawley, as the sole ground upon which the demurrers were actually sustained and the bill dismissed, that the bill, though filed within two years after the entry of the decree sought to be reviewed, was not filed within the time allowed by law, and that the time allowed by law for filing the bill of review was limited by the end of the term of the said Circuit Court at which the decree sought to be reviewed was made. (Tr. pp. 309, 316–317, 318, 319–320, 321).

The bill of review thus dismissed asks for the

review and reversal of a former decree of the said Circuit Court and a dismissal of the suit in which it was made, upon the ground of error in law apparent upon the face of the said decree, the sole error assigned and shown being that the said Circuit Court was without jurisdiction to make the said decree and without jurisdiction of the suit in which it was made. (Tr. pp. 266–271).

The decree sought to be reviewed is the final decree made in the original suit entitled *The President and Trustees of Bowdoin College et al.*, vs. *James P. Merritt et al.*, and for brevity hereinafter designated as *Bowdoin College* vs. *Merritt*.

The decree thus sought to be reviewed (the decree in *Bowdoin College* vs. *Merritt*) was announced by the said Circuit Court on the 5th day of June, 1896, and was signed by the Judge (Hon. Thos. P. Hawley) and entered on the 18th day of June, 1896. (Tr. 228, 309).

The term of the said Circuit Court at which the decree sought to be reviewed was made, expired July 10, 1896,—22 days after the making and entry of the decree sought to be reviewed.

The appellants' bill of review was filed in the Circuit Court April 1, 1898. An amendment was filed April 11, 1898. A later amendment stating the time occupied by two appeals to the Supreme Court from the decree sought to be reviewed was filed June 2, 1898. (Tr. pp. 302, 303, 304, 280, 285).

Prior to the filing of the bill of review two appeals had been taken to the Supreme Court from the decree in *Bowdoin College* vs. *Merritt*. Those appeals were taken upon respectively the first and fourth clauses of the 5th section of the Act of March 3, 1891 (the Act establishing Circuit Courts of Appeals), and were taken by two of the defendants to that decree, namely, James P. Merritt (one of the appellants here) and Harry P. Merritt. The first appeal was upon the sole question of the jurisdiction of the Circuit Court. It was taken Dec. 16, 1896, and was dismissed by the Supreme Court May 24, 1897, and the mandate of dismissal was received by the Circuit Court June 16, 1897. That appeal was dismissed on the sole ground that the Circuit Court had not made a certificate of the question of jurisdiction at the term of Court at which the said decree was entered, and had no power to make such certificate after the expiration of that term. (See *Merritt* vs. *Bowdoin College*, 167 U. S. 745; *Merritt* vs. *Bowdoin College*, 169 U. S. 551, 556). The second was a general appeal of the case on the ground that the construction or application of the Constitution of the United States was involved. It was taken June 17, 1897, and was dismissed by the Supreme Court March 14, 1898, and the mandate certifying the dismissal was received by the Circuit Court March 28, 1898, four days prior to the filing of the appellants' bill of review. It was dismissed on the ground that the case involved the construction and application of an Act of Congress, but not of the Constitution. (See

Merritt vs. *Bowdoin Coll.*, 169 U. S. 551). (Tr. pp. 281–285).

Although the actual ground upon which the Circuit Court dismissed appellants' bill of review is expressly stated in the decree here appealed from, and was declared by Judge Hawley to be that above stated, the demurrers upon which the decree was made, also set up that the bill of review "does not state such a cause "nor contain any such matter of equity as doth or "ought to entitle the complainants to reverse the said "decree or to have any relief" and that "there are no "errors in the record or in the decree mentioned in the "said bill" [of review]. (Transcript pp. 287–288, 292, 297).

The bill of review contains *in extenso* the entire decree and record of *Bowdoin College* vs. *Merritt* (the decree and record sought to be reviewed). (Tr. pp. 250; 16–228).

The jurisdiction of the suit (*Bowdoin College* vs. *Merritt*) by the United States Circuit Court, was claimed by the parties maintaining the suit, and was upheld by the Court, solely as a controversy between citizens of different States. (Tr. pp. 17–42).

Morris vs. *Gilmer*, 129 U. S. 325.

The suit (*Bowdoin College* vs. *Merritt*) was a bill "to quiet title" (*Bowdoin Coll.* vs. *Merritt*, 63 Fed. 213), "a suit in equity to quiet title to certain property" (*Bowdoin Coll.* vs. *Merritt*, 75 Fed. 481). The

title sought to be quieted, and quieted by the decree, is the title of John A. Stanly and Stephen W. Purington, and the survivor of them (citizens of California), as trustees in a trust deed of real estate and conveyance of personal property, stated in the bill as being " a " large amount of real estate and a large amount of per- " sonal property, in all of the aggregate value of about " one million two hundred thousand dollars, the said " real estate being of the approximate value of seven " hundred and fifty thousand dollars " (Tr. p. 30), the said trust deed of real estate and conveyance of personal property alleged to have been executed by the said Catherine M. Garcelon to the said trustees on April 21, 1891, and the said real estate being partly in the County of Alameda and partly in the City and County of San Francisco, State of California, and the said trustees being in possession of all the said property; and the suit was to quiet such title of the said trustees, and such title was by the decree quieted, against certain persons (all of them citizens of California), namely, James P. Merritt (appellant here) and Frederick A. Merritt, heirs of the said Catherine M. Garcelon, Thos. Prather and Wm. E. Dargie, alleged to have confederated with the said heirs to support them in their claim to the said property, Harry P. Merritt, one of the two residuary legatees of the said Catherine M. Garcelon, George W. Reed, her administrator with will annexed (the other appellant here), and O. C. Miller, executor of the will of Stephen W. Purington, her other residuary legatee. Of the persons last named,

Harry P. Merritt, Reed, administrator, and Miller, executor, were brought into the suit by supplemental bills. (Tr. pp. 16–228).

The persons named as complainants in the title of the bill (*Bowdoin College* v. *Merritt*) are the President and Trustees of Bowdoin College, a corporation, and 51 others (natural persons), everyone of the persons so named as complainants being a citizen of some other state than California, and all being beneficiaries of the trust. In the title to the bill the persons so named as complainants are stated as " suing in behalf of them-" selves and of all other beneficiaries of the trust deed " made and executed by the late Catherine M. Garcelon " to John A. Stanly and Stephen W. Purington who " may choose to come in and unite with them in the " prosecution of this suit". (Tr. pp. 16-17).

The bill (*Bowdoin College* vs. *Merritt*) sets out verbatim the trust deed, and declaration of trust, and shows it to be an active trust, the trustees John A. Stanly and Stephen W. Purington, and the survivor of them, being vested with the legal title to the property and charged with the duty to enter into possession of and to hold, manage and control the property as long as they should please up to a time then nearly five years in the future, to sell it and convey the title and out of the proceeds to pay various sums of money, aggregating $211,300.00 to a large number respectively of designated beneficiaries, some of them citizens of California and others citizens respectively of various

other states, and of the residue to pay four-tenths to the President and Trustees of Bowdoin College, a corporation, of the State of Maine, as a beneficiary, and six-tenths to John A. Stanly, Dr. A. H. Agard and Thomas H. Pinkerton, citizens of California, as beneficiaries in trust to found and maintain a hospital to be known as "The Samuel Merritt Hospital". (Tr. pp. 17-42.)

In the title of the bill (*Bowdoin College* vs. *Merritt*) the trustees John A. Stanly and Stephen W. Purington (whose title the suit was brought to quiet) are named among the "defendants"; but the bill asks for no process to bring them into the suit, and not only asks for no relief against them but asks all the relief in their favor; i. e., that their title to the property be quieted as against the other persons named as defendants. The bill contains no allegation against the said trustees, and does not state that they have been requested to join the suit as co-plaintiffs or that they have refused to do so,—the bill only stating, in this regard, that the trustees have been requested to bring a suit of their own to quiet their title and have refused to do so. (Tr. pp. 37, 39-42.)

The bill (*Bowdoin College* vs. *Merritt*) was filed and the suit begun in the Circuit Court Feb. 23, 1892, (Tr. p. 217). The subpœna was not served upon the trustees Stanly and Purington, or either of them (Tr. pp. 45-46), but on the return day of the subpœna (April 4, 1892) they voluntarily filed in the suit a paper, called by them an "answer", containing no prayer and setting

up no opposition to the suit, but in which they averred that all the allegations of the bill were true except that they had done more in the execution of the trust than the bill stated, i. e., that two parcels of the real estate had been, in pursuance of the trust, sold and that the proceeds had been received and were held by them in accordance with their trust as alleged in the bill. This so-called answer is shown at pages 53-55 of the transcript. No replication to that so-called "answer" was ever filed (Tr. pp. 217-222), the so-called "complain-" ants" adopting it as substantially an amendment to the bill. Neither of the trustees (Stanly and Purington) at any time resisted the suit in any particular or in any degree whatever.

The bill (*Bowdoin College* vs. *Merritt*) avers the citizenship of the respective parties to be as above stated. The various supplemental bills bringing in additional parties defendant, as above stated, are in harmony with the allegations of the original bill, and allege the additional defendants so brought in, to be citizens of California, as above stated. No denial of the citizenship of the respective parties, as above stated, was ever filed or made. (Tr. 17-19; 94-95; 121-122; 194-197).

The respective defendants in the suit (*Bowdoin College* vs. *Merritt*), except only the so-called defendants Stanly and Purington, the trustees, were brought before the Court by actual service of process upon them, and every one of them, except only the said trustees, filed his answer, and to every such answer the com-

plainants filed the general replication. (Tr. pp. 217-222; 61; 92; 93; 193.)

It was upon the bill and the said so-called "answer" of the trustees Stanly and Purington treated as a supplement of the bill, upon the supplemental bills bringing in the defendants Harry P. Merritt, Reed, administrator, and Miller executor, as above stated, upon the consent of the defendant Frederick A. Merritt, upon the respective answers of the defendants James P. Merritt, Prather, Dargie, Harry P. Merritt, Reed, administrator and Miller executor, and upon the replications to the respective answers of these six last named defendants,—that the case (*Bowdoin College* vs. *Merritt*,) was heard and decided by the Circuit Court and the final decree upon the merits made on June 18, 1896, as above stated —a decree quieting the title of the said trustees Stanly and Purington and the survivor of them, against the defendants James P. Merritt, Frederick A. Merritt, Harry P. Merritt, Prather, Dargie, George W. Reed administrator and O. C. Miller executor (Tr. pp. 222–228)

Prior to the making of the final decree (*Bowdoin College* vs. *Merritt*) two petitions of intervention were filed in the suit asking leave to join as co-complainants. Both these petitions were filed by the same solicitors who filed the original and supplemental bills. The first of the petitions was filed March 31, 1892, the petitioners being twenty-three natural persons (all citizens of California), co-beneficiaries, with the persons

named as complainants in the bill, in the alleged trust. The second of these petitions was filed July 6, 1892, the petitioners being five natural persons (every one a citizen of some other State than California) co-beneficiaries, with the persons named as complainants in the bill, in the said alleged trust (Tr. pp. 46–53; 62–72; 217; 218).

In the suit (*Bowdoin College* vs. *Merritt*) the first defense interposed by the defendant James P. Merritt was a demurrer to the bill, setting up, among other things, that the Court had no jurisdiction of the suit. That demurrer was heard and overruled by Hon. Thos. P. Hawley, District Judge. In overruling the demurrer Judge Hawley filed a written opinion which may be seen in Volume 54 Federal Reporter at pages 55–63. As shown by the written opinion, Judge Hawley did not actually consider the question whether the bill showed the case to be a controversy between citizens of different states (Tr. pp. 53-60; 74; 218).

The next defense to the suit (*Bowdoin College* vs. *Merritt*) by the defendant James P. Merritt was a plea to the jurisdiction of the Court and a motion to dismiss the suit. Both the plea and the motion were upon the ground that the suit was not a controversy between citizens of different States and not within the jurisdiction of the Court. One ground of the motion was that this want of jurisdiction was shown by the pleadings. The plea and the motion were heard by Hon. Joseph McKenna, Circuit Judge, and were overruled. The

opinion of Judge McKenna may be seen in Volume 63 Federal Reporter at pages 213–218 (Tr. pp. 81–90; 93; 116–119; 119–120; 218–219).

Afterward the defendant George W. Reed, administrator (appellant here) was brought into the suit (*Bowdoin College* vs. *Merritt*) by supplemental bill, as above stated. Upon being so brought in, the first defense interposed by him was a motion to dismiss the suit, upon the ground that it was shown by the pleadings not to involve a controversy between citizens of different States and to be not within the jurisdiction of the Court. This motion was overruled by Judge McKenna, upon the authority of his previous ruling above stated (Tr. pp. 182–186; 221).

Having failed as above stated, to obtain a dismissal of the suit (*Bowdoin College* vs. *Merritt*), the defendants James P. Merritt and George W. Reed, administrator, (the appellants here), each filed an answer contesting the suit upon the merits. But, each of them, in his answer, also set up and urged that the suit was not a controversy between citizens of different States and not within the jurisdiction of the Court (Tr. pp. 75–80; 186–192; 218–221). To each of these answers the general replication was filed, as already stated (Tr. pp. 92; 193; 219; 221).

The final hearing of the suit (*Bowdoin College* vs. *Merritt*), the final hearing upon the merits, was before Hon. Thos. P. Hawley, District Judge. In giving the decision Judge Hawley filed a written opinion which

may be seen in Volume 75 Federal Reporter at pages 480–512. As shown by the written opinion, Judge Hawley expressly refused a consideration of the question of the jurisdiction of the suit by the United States Circuit Court (See *Bowdoin Coll.* vs. *Merritt* 75 Fed. at p. 481).

The efforts to obtain relief by appeal are stated above. The petition for the second appeal was filed on the next day after the mandate dismissing the first appeal was received by the Circuit Court. While those appeals were pending no bill of review could be filed (*Ensminger* vs. *Powers*, 108 U. S. 302; *Pac. R. R. of Mo.* vs. *Mo. Pac. R.*, 111 U. S. 520). The bill of review was filed four days after the second appeal was dismissed. The bill of review and the amendments thereto were all filed within less than two years after the entry (and within less than two years after the rendition) of the decree in *Bowdoin College* vs. *Merritt* sought to be reviewed. (Tr. pp, 228, 241, 302–3, 280, 285).

The appellants' bill of review duly specifies the errors of law (namely, the absence of jurisdiction) apparent upon the face of the decree sought to be reviewed, and shows each of them respectively to be greatly aggrieved by the said decree, and contains all the requisites, whether of form or substance, of a bill of review. (Tr. pp. 266–275, 229–285).

(b) Specifications of the Errors Relied Upon.

The decree of the Circuit Court dismissing the appellants' bill of review (the decree appealed from) is erroneous in the following particulars:

(1) In holding that the time within which it was permissible for the appellants to file their said bill of review expired with the term of the said Circuit Court at which the decree sought to be reviewed was made and entered.

(2) In holding that the appellants were not entitled to file their said bill of review at any time within two years after the entry of the decree sought to be reviewed.

(3) In holding that the appellants' bill of review was not filed within due time, that the time limited by law or by the rules of practice of courts of equity for exhibiting such a bill had elapsed prior to the exhibiting of the bill.

(4) In holding the appellants guilty of neglect or laches in the institution of the suit precluding them from the right to have a review or reversal of the decree sought by the appellants' bill to be reviewed and reversed,—that "the complainants herein have been "guilty of such laches and delay in the exhibition of

" the said bill of complaint that they are not entitled " to the or any of the relief prayed for therein". (Tr. p. 308).

The foregoing specifications cover the ground stated in the decree appealed from as the only actual ground upon which it was made (Tr. p. 308). The following specifications apply to the other grounds stated in the demurrers.

(5) In holding that there are no errors, or that there is no error, in the decree stated in the appellants' bill—the final decree sought by the appellants' bill to be reviewed and reversed—and apparent upon the face of the said decree and justifying a review thereof.

(6) In holding that the decree stated in the appellants' bill of review, and the review and reversal of which is prayed for by the said bill, is not erroneous in law in that it appears upon the face of the said decree that the said decree was made and entered by the said Circuit Court as the final decree upon the merits of a suit involving a controversy between citizens of different States, and upon no other ground of jurisdiction of the subject matter of the said suit, and in that it appears upon the face of the said decree that the said suit was never and did never involve a controversy between citizens of different States, but only a contro-

versy between citizens of the State of California, that is to say, between the said John A. Stanly and Stephen W. Purington, as trustees, and the survivor of them, citizens of the State of California, on the one side, and the said James P. Merritt, Frederick A. Merritt, Harry P. Merritt, George W. Reed, administrator with the will annexed of the estate of Catherine M. Garcelon, deceased, and others, citizens of the said State, on the other side,– it therefore appearing upon the said decree as an error of law that the said Circuit Court did never have jurisdiction to make the said decree or of the subject matter of the said suit.

(7.) In holding that the said John A. Stanly and Stephen W. Purington as trustees (and the survivor of them) were not respectively, as appearing upon the face of the decree, the review of which is prayed for by the appellants' bill, parties whose citizenship was and is to be considered upon the question of the jurisdiction of the said Circuit Court to make the said decree.

(8.) In holding that the said John A. Stanly and Stephen W. Purington as trustees (and the survivor of them) were not respectively, as appearing upon the face of the said decree, necessary and indispensable parties thereto and, in the controversy constituting the subject matter of the suit, opposed to the President and Trustees of Bowdoin College and the other persons therein designated as complainants, erroneously holding the said controversy to be between citizens of

different States, and the said Circuit Court to have, therefore, jurisdiction of the subject matter of the said suit and to make the said decree.

(9.) In holding that, as appearing upon the face of the said decree, it did not appear to the satisfaction of the said Circuit Court that parties to the said suit in which the said decree was made, for the purpose of creating a case cognizable by the said Circuit Court, under the Act of the Congress of the United States entitled "*An Act to determine the jurisdiction of Circuit* "*Courts of the United States and to regulate the* "*removal of causes from State Courts, and for other pur-* "*poses*", approved March 3, 1875, and under the said Act as subsequently amended, were improperly joined as follows: the said John A. Stanly and Stephen W. Purington as trustees (and the survivor of them) improperly joined and feigned to be defendants, while in truth plaintiffs, and, they being plaintiffs, the said suit not presenting a controversy between citizens of different States and not being a suit within the jurisdiction of the said Circuit Court.

(10.) In holding that, as appearing upon the face of the said decree, it did not appear to the satisfaction of the said Circuit Court, that parties to said suit, for the purpose of creating a case cognizable by the said Circuit Court under the said Act of Congress, were collusively joined, as follows: the said John A. Stanly and Stephen

W. Purington, as trustees, (and the survivor of them) collusively joined and feigned to be defendants, while in truth plaintiffs, and, they being plaintiffs, the said suit not presenting a controversy between citizens of different States and not being a suit within the jurisdiction of the said Circuit Court.

(11.) In holding that the appellants' bill of review does not state such a case nor contain any such matter of equity as doth or ought to entitle them to a review and reversal of the said decree.

(12.) The decree of the Circuit Court dismissing the appellants' bill of review (the decree appealed from) is erroneous and against the just rights of the appellants, because made solely upon the said bill and the demurrers of certain of the defendants thereto, and the said bill shows the appellants respectively to be greatly aggrieved and wronged by the decree the review and reversal of which is prayed for in the appellants' said bill, and because it appears and is manifest, as an error of law, upon the face of the said decree, that it was not within the jurisdiction of the said Circuit Court, or of the judicial power of the United States, to make or enter the said decree, and that the subject matter of the suit in which the said decree was made was not within such jurisdiction, it appearing and being manifest in law upon the face of the said decree that the said decree was made, and the jurisdiction of the said subject matter held, by the said Circuit Court solely upon the

ground that the case was a controversy between citizens of different States, and that the said ground was untrue, and that before and at the time of the making of the said decree, and ever since, it appeared to the satisfaction of the said Circuit Court that, for the purpose of creating a case cognizable under the said Act of Congress, parties to the suit were improperly and collusively joined as follows: the said John A. Stanly and Stephen W. Purington, as trustees, (and the survivor of them) improperly and collusively joined and feigned to be defendants, while in truth plaintiffs, and, they being plaintiffs, the case not being a controversy nor involving a controversy between citizens of different States and not being a suit of which the subject matter or any part thereof was within the jurisdiction of the said Circuit Court, all of which appeared and appears as error in law upon the face of the said decree and, as so appearing, is shown in the appellants' said bill of review; and because this suit was commenced and the appellants' said bill (and every amendment thereto) exhibited and filed within less than two years after the entry of the said decree and within due time and without neglect or laches, and this suit having been prosecuted with all diligence and without neglect or laches.

(c.) Brief of the Argument.

I.

The Appellants' Bill of Review was Filed within Due Time.

1.

It was the ruling of the Court below that the time within which the appellants were entitled to file their bill of review was limited by the end of the term of the Circuit Court at which the decree (in *Bowdoin College* vs. *Merritt*) sought to be reviewed was entered. This was the sole actual ground upon which the decree appealed from was made.

(See the Decree, Transcript p. 308.) Opinion of Judge Hawley, (Transcript pp. 316–317, 319–320, 321.)

This ruling of the Court below was made, not upon the authority of any decision or treatise, nor upon any express provision of statute, but solely as an original ruling and upon an asserted analogy with the rule that the power of the Circuit Court to make a certificate of the question of jurisdiction and thus render the case appealable, existed only until the end of the term of court at which its final decree was made.

(See opinion of Judge Hawley, Transcript pp. 316–317, 319–320, 321.)

2.

But, until the end of the term of the Circuit Court at which its final decree was made, the Court retains its power over the suit, the decree and the parties.

> " The parties were not in law discharged from " their attendance in the cause until the close of " the term, and the decree, though entered, was " ' in the breast of the Court ' until the final " adjournment."
>
> " The general power of the Court over its own " judgments, orders and decrees, in both civil and " criminal cases, during the existence of the term " at which they are first made, is undeniable."

At any time until the end of the term at which the final decree sought to be reviewed was made, the Circuit Court could, without the filing of any bill of review or any bill whatever, have given all the relief to obtain which the appellant's bill was subsequently filed.

Ayres vs. *Wiswall*, 112 U. S. 190.
Goddard vs. *Ordway*, 101 U. S. 752.
Ex-parte Lange, 18 Wall. 163, 167.
Bac. Abr. tit., Amendment and Jeofail. A.

And for the particular error in law which is the ground of the appellants' bill of review, the Circuit Court could, of its own motion, have vacated the decree here sought to be reviewed and dismissed the suit " at " any time " up to the end of the term at which that decree was made.

Ayres vs. *Wiswall*, 112 U. S. 187-193.
Morris vs. *Gilmer*, 129 U. S. 326–327.

In *Ayres* vs. *Wiswall*, 112 U. S. 187, the Circuit Court at first made and entered a final decree upon the merits in favor of the plaintiffs. But after the decree was entered and prior to the end of the term, the Court set aside the decree and dismissed the suit, and upon the ground that it was apparent upon the face of the record that the Court was without jurisdiction of the suit. This action was affirmed by the Supreme Court. The decision is a direct, express and conclusive authority that, without any bill of review, the same course should have been followed by the Circuit Court in the case of the decree in *Bowdoin College* vs. *Merritt*.

3.

And if, at any time after the decree sought to be reviewed was made and before the expiration of the term, a motion had been initiated in the Circuit Court to modify, reverse or vacate that decree, the pendency of such motion would have given the Court power to modify, reverse or vacate the decree, in pursuance of such motion, at a subsequent term of the Court.

Goddard vs. *Ordway*, 101 U. S. 745, 750–751.

4.

Therefore, what ground could possibly exist entitling a party to file a bill of review prior to the expiration of the term of the Court at which the decree sought to be reviewed was made?

We therefore submit that to hold that the appellants were not entitled to file a bill of review after the end of the term of the Circuit Court at which the decree sought to be reviewed was made, is to hold that they were not entitled to file a bill of review except at a time when to file such a bill would have been idle, surperfluous and vain.

Lex neminem cogit ad vana seu inutilia peragenda. Lex nil facit frustra, nil jubet frustra. Lex non praecipit inutilia, quia inutilis labor stultus Lex semper intendit quod convenit rationi.

The essential purpose of a bill of review is to bring before the Court that which, without such a bill, would not be before the Court. This essential purpose of the bill of review requires that it be filed after the expiration of the term of Court at which the decree sought to be reviewed was made, for the power of the Court to modify, reverse or vacate any final decree exists, without any such bill, until the end of the term at which such decree was made and no longer.

Sibbald vs. *United States*, 12 Pet. 492.

We therefore submit that to hold that a bill of review for error apparent upon the face of the decree can not be filed after the expiration of the term of the Court at which such decree was made, is to abolish the right to file a bill of review.

5.

Again, the sole ground for holding a bill of review not to have been seasonably filed, is laches. The principle is stated by the Supreme Court in *Thomas* vs. *Harvie's Heirs*, 10 Wheat. 149, speaking by Mr. Justice Washington, as follows:

> " It must be admitted, that bills of review are " not strictly within any act of limitations pre- " scribed by Congress; but it is unquestionable, " that Courts of equity, acting upon the principle " that laches and neglect ought to be discounte- " nanced, and that in cases of stale demands its " aid ought not to be afforded, have always inter- " posed some limitation to suits brought in those " Courts."

Such being the principle, how can a party be treated as guilty of laches for not filing his bill of review at a time when to have filed such a bill would have been idle and surperfluous?

6.

Again, the time within which an aggrieved party may file a bill of review for error apparent upon the face of the decree sought to be reviewed, must be such as to make it possible to file such a bill even though the decree sought to be reviewed was made at the very end of the term. *Lex non intendit aliquid impossible.*

Although the rule is that a certificate of the question of jurisdiction (making the case appealable) must be made before the end of the term at which the decree

was rendered, still such a certificate can always be obtained, even where the decree was made at the end of the term; for if such certificate is applied for before the end of the term, the application may be continued to and the certificate granted at a subsequent term.

Goddard vs. *Ordway*, 101 U. S., 745, 750–751.

But where a final decree is made upon the last day of the term it would in most if not all cases be physically impossible to file the bill of review before the close of the term. The bill of review must set out in full the pleadings, proceedings and decree, the entire record of the suit in which the decree sought to be reviewed was made.

Story Eq. Pl., §§ 420, 428.
Mitford Eq Pl., Ch. 1, §. 3, Pt. 2.
Eq. Rule 90.

And a bill of review for error apparent upon the face of the decree is filed by the party and as a matter of right and without leave of Court

Davis vs. *Speiden*, 104 U. S. (Miller), 275.
Ross vs. *Prentiss*, 4 McLean, 106.

7.

The Shortest Possible Limitation is Two Years After the Entry of the Decree to be Reviewed.

" A bill of review must ordinarily be brought
" within the time limited by statute for taking an

" appeal from the decree sought to be reviewed."
Ensminger vs. *Powers*, 108 U. S., 302.

It is thoroughly established that this is the shortest possible time within which a party aggrieved is entitled to file a bill of review for error of law apparent upon the face of the decree sought to be reviewed.

Ensminger vs. *Powers*, 108 U. S., 302.
Thomas vs. *Harvie's Heirs*, 10 Wheat., 150.
Trust Co. vs. *Grant Locomotive Works*, 135 U. S., 296–297.

In *Thomas* vs. *Harvie's Heirs*. 10 Wheat., 150, the Court, next after the language above quoted, said:

> " These principles seem to apply, with peculiar " strength, to bills of review, in the Courts of the " United States, from the circumstance, that Con- " gress has thought proper to limit the time " within which appeals may be taken in equity " causes, thus creating an analogy between the " two remedies, by appeal, and a bill of review, so " apparent, that the Court is constrained to con- " sider the latter as necessarily comprehended " within the equity of the provision respecting the " former."

The entire period of " the time limited by statute for " taking an appeal from the decree sought to be re- " viewed" is the shortest possible time within which the party aggrieved is of right entitled to file a bill of review for error of law apparent upon the face of the decree sought to be reviewed. If for any reason, he cannot be justly chargeable with laches for not having filed it within that time—if upon the facts it can not be justly

said that the delay in filing the bill within the time limited for appeals was due to laches, then, even though the time limited by statute for taking appeals has long expired, the bill of review must be held to be seasonably filed.

Ensminger vs. *Powers*, 108 U. S., 302.
Pac. R. R. of Mo. vs. *Mo. Pac. R.*, 111 U. S., 520.
Vaughan vs. *Black*, 63 Mich., 219.
Keys vs. *Marin Co.*, 42 Cal., 256.

Such being the rule, it is needful to ascertain only what was "the time limited by statute for taking an appeal from the decree sought to be reviewed" (*Ensminger* vs. *Powers*, 108 U. S , 302).

8.

The only error of law for which the appellants' bill of review was filed, was the error, appearing upon the face of the decree sought to be reviewed, that the Court had no jurisdiction to make the decree and no jurisdiction of the suit (Transcript, pp. 266–275).

This is error in law for which a bill of review is the proper remedy.

Ketchum and Wife vs. *Farmers' Loan and Trust Co.*, 4 McLean, 1.
Miller vs. *Clark*, 52 Fed. Rep., 900.
Ensminger vs. *Powers*, 108 U. S., 301–2, 303.
Gregor vs. *Molesworth*, 2 Ves. Sr., 109.
Whiting vs. *U. S. Bank*, 13 Peters, 6.
Story Eq. Pl. §405.
2 Daniel Ch. Pr. (6th Am. Ed.) 1575.

In order to ascertain whether such error exists, the whole record, including the pleadings, is to be examined.

Putnam vs. *Day*, 22 Wall. 60.
Shelton vs. *Van Kleek*, 106 U. S. 532.
Buffington vs. *Harvey*, 95 U. S. 99.
Whiting vs. *U. S. Bank*, 13 Pet. 6.
Barker vs. *Barker*, 2 Woods 242.
Dexter vs. *Arnold*, 5 Mason 303.

From such examination of the record it appears that the suit in which the decree sought to be reviewed in the case at bar was made, was a case in which the jurisdiction of the Court was in issue and properly in issue.

Transcript, pp. 17–19; 53–60; 74, 75–80; 81–90, 92, 93; 94–95; 116–119; 119–120; 121–122; 186–192; 194–197; 218–221.
Morris vs. *Gilmer*, 129 U. S. 326–327.

Since the case was one in which the jurisdiction of the Court was in issue the parties aggrieved by the decree had the right to an appeal to the Supreme Court of the United States—an appeal upon the identical errors which constitute the ground of the appellants' bill of review. This is the provision of the first clause of the Act of March 3, 1891, Sec. 5, (The Act establishing the Circuit Courts of Appeals.)

See the Act in Vol. 138 U. S. Reps. Appendix, p. 711.
Lau Ow Bew vs. *United States*, 144 U. S. 56.

The Act of Congress giving the right to an appeal being silent as to the time limited for taking the appeal, the limitation is that provided in the Revised Statutes, as follows:

> "§ 1008. No judgment, decree or order of a "Circuit or District Court, in any civil action, at "law or in equity, shall be reviewed in the "Supreme Court, UNLESS the writ of error is "brought, or THE APPEAL IS TAKEN WITHIN TWO "YEARS AFTER THE ENTRY OF SUCH JUDGMENT, "DECREE or order."

Here, then, we have the express provision of the Act of Congress, that "the time limited by statute for tak-"ing an appeal from the decree sought to be reviewed" (*Ensminger* vs. *Powers*, 108 U. S. 302) is that such appeal was to be "taken within two years after the "entry of such judgment decree". (§ 1008 Rev. Stats.)

It is therefore, as we think, manifest and not justly to be denied, that the shortest possible limitation of time within which the appellants were entitled to file their bill of review was "within two years after the "entry" of the decree sought to be reviewed.

The appellants' bill of review and the amendments thereof were filed "within two years of the entry" of the decree sought to be reviewed. We submit that it was filed at a time when the appellants were of right entitled to file it. (Transcript pp. 228, 241, 280, 285, 302–3, 318).

9.

Again, take the question of laches upon the actual facts of the case. The first appeal was taken within two days less than six months after the entry of the decree. The second appeal was taken on the very next day after the mandate dismissing the first appeal was filed. Although both those appeals were dismissed, they were both taken and prosecuted in good faith, and both were taken and allowed within proper time, and therefore up to the time (March 28, 1898) when the mandate dismissing the second appeal was received by the Circuit Court, the appellants, having been honestly and in good faith looking to each of those appeals respectively for their remedy, can not be justly chargeable with laches in not having sought a remedy by a bill of review. (Transcript pp. 281–285).

Merritt vs. *Bowdoin College*, 167 U. S. 745;
Merritt vs. *Bowdoin College*, 169 U. S. 551;
Pac. R. R. of Mo. vs. *Mo. Pac. R*, 111 U. S. 520.

And within *precisely four days* (April 1, 1898) after the mandate dismissing the second appeal was received by the Circuit Court, the appellants' bill of review was filed. How, then, by any possibility whatever, can it be justly said that "the complainants herein have "been guilty of such laches and delay in the exhibi- "tion of the said bill of complaint that they are not "entitled to the or any of the relief prayed for "therein"? (Transcript pp. 285, 302).

10.

The Court below, in dismissing the appellants' bill, conceded theoretically the formal statement of the rule to be correct, that a bill of review may be filed within the time limited by statute for taking an appeal, but, ignoring the express provision of the statute (§ 1008 Rev. Stats.) that such time was " two years after the " entry of such decree", took the rule that the certificate of the question of jurisdiction required by the first clause of the 5th Section of the Act of March 3, 1891 (making the case appealable), can be made by the Circuit Court only at the term at which the decree was made—a rule which is not expressly stated in the Act and is derived only by construction and implication—and by a secondary construction and implication superimposed upon the rule so derived, deduced a rule that, by the first clause of the 5th section of the Act of March 3, 1891, the time for taking the appeal there provided is limited by the end of the term of the Circuit Court at which the decree to be appealed from was made.

That the Act of March 3, 1891, contains no such limitation is, we think, clear.

(1) The statute (§ 1008 Rev. Stats.) is plain and unambiguous that the time within which the appeal may be taken is two years.

"Where a law is plain and unambiguous,

" whether it be expressed in general or limited
" terms, the Legislature should be intended to
" mean what they have plainly expressed, and,
" consequently, no room is left for construction."

Fisher vs. *Blight*, 2 Cranch 358, 399.

(2.) To hold that the Act of March 3, 1891, limits the time for taking an appeal by the end of the term of the Circuit Court at which the decree to be appealed from is made, is to make the Act repeal Sec. 1008 of the Revised Statutes by implication, and

" The rule is well settled that repeals by impli-
" cation are not favored and are never admitted
" where the former can stand with the new Act."

Chew Heong vs. *United States*, 112 U. S. 549.

(3.) The Act of March 3, 1891, contains language manifestly showing that the time limited by Sec. 1008, *Rev. Statutes*, for taking appeals to the Supreme Court, is not repealed. We refer to the following language of the 11th and 14th sections respectively.

" Sec. 11. That no appeal or writ of error
" by which any order, judgment or decree may
" be reviewed in the Circuit Courts of Appeals
" under the provisions of this Act shall be taken
" or sued out except within six months after the
" entry of the order, judgment or decree sought to
" be reviewed." * * *

" Sec. 14. * * * And all Acts and parts of
" Acts relating to appeals or writs of error incon-

"sistent with the provisions for review by "appeals or writs of error in the preceding sec- "tions five and six of this Act are hereby "repealed."

(4.) The first clause of the 5th section of the Act of March 3, 1891, applies equally to writs of error and appeals. The language is:

"Sec. 5. That appeals or writs of error may "be taken from the * * * existing Circuit "Courts direct to the Supreme Court in the follow- "ing cases:

"In any case in which the jurisdiction of the "court is in issue; in such cases the question of "jurisdiction alone shall be certified to the "Supreme Court from the court below for "decision."

* * * * *

If, the appeal can be taken only at the term of the Circuit Court at which the decree to be appealed from was entered, then it must follow that, where the case is at common law instead of in equity, the writ of error can be brought only before the end of the term of the Circuit Court at which the judgment was made,—a conclusion manifestly erroneous.

(5.) The making of a certificate of the question of jurisdiction is the act of the Circuit Court and not the act of any party. The Court may make such a certifi-

cate even though no party has asked that the existence of a question of jurisdiction be certified. How, then, can it be said that the making of such a certificate is the taking of an appeal?

(6.) The making of a certificate of the question of jurisdiction is manifestly an act of the same character as the signing of a bill of exceptions in an action at common law. And if the suit is at common law, it is proper to certify the question by a bill of exceptions.

Re Lehigh Mg. & Mfg. Co., 156 U. S. 322.

A bill of exceptions can be signed only prior to the expiration of the term at which the judgment is made. (*Muhler* vs. *Ehlers*, 91 U. S. 249); but the obtaining of a bill of exceptions is not bringing a writ of error. If obtaining a bill of exceptions were the bringing of a writ of error, then what disposition can be made of the Act of Congress which prior to June 1, 1872, expressly provided that a writ of error might be brought within five years after the entry of the judgment, and subsequently has provided that a writ of error may be brought within two years after the entry of the judgment?

(7.) The fact that the Circuit Court could make the certificate of the question of jurisdiction only in the term at which the final decree was rendered, is not due to any limitation of the time within which an appeal may

be taken, but depends solely upon the ancient and fundamental principle that, unless the suit is revived in some manner, as by a bill of review, the power of the Court over the decree and the suit ends with the term at which the final decree is made.

Sibbald vs. *United States*, 12 Pet. 492.

Bac. Abr. tit. Amendment and Jeofail A.

(8.) Manifestly the making of the certificate of the question of jurisdiction only puts the case into a condition enabling any party aggrieved by the judgment or decree to take an appeal or bring a writ of error (accordingly as the case may be in equity or at common law) within the time limited by law. (*Maynard* vs. *Hecht*, 151 U. S. 324.)

But it is not requisite to the right to file a bill of review that the party should be able to take an appeal, from the decree sought to be reviewed.

Miller vs. *Clark*, 52 Fed. 900.

Ensminger vs. *Powers*, 108 U. S., 302.

In *Miller* vs. *Clark*, 52 Fed., 900, full relief was given by the bill of review, but the case was never appealable. In *Ensminger* vs. *Powers*, 108 U. S., full relief was given by the bill of review, and yet when the bill was filed the right to take an appeal had been lost for 8 months and 12 days.

It is nowhere made any part of the definition of a bill of review that the case must be appealable. See

for instance, the definition in

Daniell Ch. Pl. & Pr., Vol. 2, *1576.

That the right to a bill of review is utterly independent of the right to take an appeal, may be illustrated by the case of writs of certiorari. A writ of certiorari can be brought only in a case where no remedy by appeal exists, and where the record shows that the judgment or order from which the relief is sought, was made without jurisdiction. And, though no limitation of the time within which the writ of certiorari may be brought is fixed by statute, yet, upon the ground of refusing relief where there has been laches, the time fixed by statute within which appeals may be taken, is held to limit the right to a writ of certiorari.

Smith vs. *Superior Court*, 97 Cal., 352.
Keys vs. *Marin Co.*, 42 Cal., 256.
People ex rel. &c. vs. *The Mayor*, 2 Hill (N. Y.) 12.

(9.) A party cannot both take an appeal and file a bill of review, but must elect between these two remedies.

Buscher vs. *Knapp*, 107 Ind. 341.
Ensminger vs. *Powers*, 108 U. S.. 302.

If a party elects to pursue the remedy by an appeal to the Supreme Court of the United States, it is requisite to furnish that Court with a certificate of the question of jurisdiction.

Maynard vs. *Hecht* 151 U. S. 324.
Merritt vs. *Bowdoin College*, 169 U. S. 556.

The purpose of the certificate of the question of jurisdiction to be sent to the Supreme Court is that only a distinct point or proposition of law may be presented for the review of the Supreme Court and thus to simplify the appeal.

Graner vs. *Faurot*, 162 U. S., 435.

But the bill of review must always be filed in and heard by the Court in which the decree sought to be reviewed was made.

Parrish vs. *Marvin*, 15 Wis. 247.
Fenske vs. *Kluender*, 61 Wis,, 607.
Ensminger vs. *Powers*, 108 U. S., 302.
Miller vs. *Clark*, 51 Fed., 900.
Root vs. *Woolworth*,150 U. S., 401.

A certificate of the question of jurisdiction, while requisite to the remedy by appeal, is therefore not required for a bill of review. It is sufficient for the bill of review that there is error in law apparent upon the face of the record of the suit in which the decree sought to be reviewed was made.

Jenkins vs. *Eldredge*, 3 Story, 299.
Whiting vs. *U. S. Bank*, 13 Pet. 6.
Dexter vs. *Arnold*, 5 Mason, 303.
Ensminger vs. *Powers*, 108 U. S., 302.

The question whether a certificate of the question of jurisdiction has been made, is therefore utterly immaterial to the right to file a bill of review. And hence it must needs be immaterial whether the time within which such a certificate can be made, has or has not elapsed.

(10.) Further grounds showing conclusively, as we think, that the reasoning and ruling of the Court below was erroneous, are stated above in points 2—6 of this head.

(11.) The Act of Congress (Act of March 3, 1875, Sec. 5: 18 Stats. 470) expressly declares that the Circuit Court shall give relief against the particular error in law for which the bill of review in the case at bar was brought, if such error " appear to the satisfaction " of said Circuit Court, *at any time*,"—a provision that can hardly be reconciled with holding that the bill of review can not be filed after the term at which the decree sought to be reviewed was made.

p 5-6 The whole section 5 of the act is shown below in division III, 5, of this brief.

———

We respectfully submit that the judgment appealed from, that " the complainants herein have been guilty " of such laches and delay in the exhibition of the said " bill of complaint that they are not entitled to the or " any of the relief prayed for therein" (Tr. p. 308), is unsound, that the appellant's bill of review was filed within due time, and that they were of right entitled to file it and to have it heard and decided upon the merits.

II.

The Refusal By the Circuit Court to Consider the Case.

As already stated, the decree appealed from is not in any degree based upon any actual consideration of the case stated in the appellants' bill of review. The decree appealed from states affirmatively that all consideration of the case stated in the bill of review as the meritorious ground of the relief sought, was withheld and refused by the Circuit Court. (Transcript pp. 306–308, 302, 311–321).

We submit that the appellants are entitled to a consideration of the case in the first instance by the Circuit Court, and that, upon the ground that such consideration has been refused, the decree appealed from is erroneous and void and should be reversed.

Ensminger vs. *Powers*, 108 U. S. 301–302;
Queen vs. *Archbishop of Canterbury*, 1 Ellis & Ellis 545;
In re Dana, 7 Benedict D. C. 1.

The rule is that a bill of review is to be brought in the Court in which the decree sought to be reviewed was made and is to be heard and decided by that Court.

Ensminger vs. *Powers*, 108 U. S. 301–302, 303;
Root vs. *Woolworth*, 150 U. S. 401;
Fenske vs. *Kluender*, 61 Wis. 607;
Parrish vs. *Marvin*, 15 Wis. 247;
Anderson vs. *Bank of Tenn.*, 5 Sneed 661;
Ferris vs. *Child*, 1 D. Chip. (Vt.) 336;

Way vs. *Hilier*, 16 Ohio 108;
Cole vs. *Miller*, 32 Miss. 89;
Hancock vs. *Hutcherson*, 76 Va. 609.

In *Parrish* vs. *Marvin*, 15 Wis. 247, the Court said:

> " A bill of review must always be filed in the " Court where the record is, and by which the " decree was pronounced. This is implied from " its very name. The Court reviews its own pro- " ceedings."

All the authorities upon the point, are, as we think, to the same effect.

III.

The Error in Law Apparent in the Decree Sought to be Reviewed,—the Meritorious Ground of the Bill of Review.

As already stated, this point was not actually adjudged or considered by the Circuit Court, and the fact that it was not is expressly stated in the decree appealed from (Tr. pp. 306–308, 302, 311–321). We therefore think that, although it is embraced within the issues raised by the demurrers upon which the decree appealed from was made (Tr. pp. 287, 292,), it is not even technically, any more than it is actually, within that decree, and not properly to be considered here on this appeal, but that for the reasons above stated, it must first be considered and adjudged by the

Circuit Court upon a hearing of the bill of review. We, however, present it here, to be considered and adjudged if such a course should be found proper.

1. The Facts.

The facts are stated, and references to the transcript given, on pages 5–13 of this brief.

The facts are also clearly stated in the body of the appellants' bill of review. (Transcript pp. 236–277).

2. The Jurisdiction Dependent Upon the Existence of a Controversy Between Citizens of Different States.

The record of the suit (*Bowdoin College* vs. *Merritt*) in which the decree sought to be reviewed was made, shows that the jurisdiction of the suit by the United States Circuit Court was claimed and held upon the sole ground that the case was a controversy between citizens of different States, and depended solely upon the existence of such a controversy.

Bowdoin Coll. vs. *Merritt*, 63 Fed. 214;
Morris vs. *Gilmer*, 129 U. S. 325.

In his opinion in the case Judge McKenna properly said (63 Fed. 214):

> " To support the jurisdiction of the Court in
> " this case there must be a controversy between
> " citizens of different States, and it must be con-

" ceded that the bill shows and the evidence estab-
" lishes that the real interests of Bowdoin College
" and Stanly and Purington [the trustees] are
" identical."

3. The Objection That the Case Was Not a Controversy Between Citizens of Different States, was at No Time Actually Considered.

It is the misfortune of these appellants that, though each of them urged in due time and proper manner and repeatedly the objection that the case was not a controversy between citizens of different States, and therefore not within the jurisdiction of the United States Circuit Court, the question was never actually considered.

The objection was first raised by demurrer to the bill (Tr. p. 58). The order overruling that demurrer expressly refers to the opinion (Tr. p. 74). The opinion is that of Hon. Thos. P. Hawley, District Judge, shown in 54 Fed. Rep. 55–63. It does not even mention the question.

The objection was next raised by plea and motions to dismiss the suit (Tr. pp. 81–86; 116–119; 182–185). The plea and motions were overruled (Tr. pp. 119, 185) by Hon. Joseph McKenna, Circuit Judge, in an opinion shown in 63 Fed. Rep. 213–218. Judge McKenna there said (p. 214):

" To support the jurisdiction of the Court in
" this case, there must be a controversy between

" citizens of different States, and it must be con-
" ceded that the bill shows and the evidence estab-
" lishes that the real interests of Bowdoin College
" and Stanly and Purington [the trustees] are
" identical; and defendant claims, therefore, that
" plaintiffs and Stanly and Purington should be
" arranged on one side as parties against the
" Merritts on the other, and when so arranged the
" suit is not wholly between citizens of different
" States."

But, further on, Judge McKenna said (p. 215):

* * * " Judge Hawley decided that the facts
" stated in the bill, combined with the refusal of
" trustees to sue, gave a cause of action to
" plaintiffs, and this must be observed as the law
" of the case.

" Starting with this as the law, *the inquiry is*
" *necessarily confined to the character of the*
" *refusal*,—whether collusive or otherwise; that is,
" as the plaintiffs' right of action to sue depends
" upon the refusal of Stanly and Purington to
" sue, was it sincere,—expressing a real resolu-
" tion.—or was it feigned to give a cause of action
" to plaintiffs?"

It is manifest from Judge McKenna's opinion that he looked upon the decision of Judge Hawley overruling the demurrer as making it " the law of the case " that the beneficiaries, and not the trustees, were the persons whose citizenship was to be considered, and that they had the right to maintain the suit in the United States Circuit Court, and that he therefore refrained from any actual consideration of the question whether the bill, or the pleadings, stated any controversy between citizens of different States.

This ruling of Judge McKenna's that the decision of the demurrer was "the law of the case" was clearly and fundamentally erroneous. Nothing is more firmly established than that up to the very end of the term at which the final decree is made, all previous rulings of the Court in the case and even the final decree itself are "in the breast of the Court" and within its power freely to modify, set aside or reverse.

Ayres vs. *Wiswall*, 112 U. S. 190.

The rule known as "law of the case" has the force of an estoppel, and the term was so applied by Judge McKenna. But in a trial court, the rule, "law of the "case", applies only to previous rulings of an appellate Court. In an appellate Court it applies only to rulings on a former appeal.

Klauber vs. *San Diego St. Car Co.*, 108 U. S., 107.
Stuart vs. *Preston*, 80 Va., 626.

The objection that the case was not a controversy between citizens of different states was next urged as the final hearing. (Tr. pp. 75-80; 92; 186-192; 193; 222-224.) And Judge Hawley then expressly refused to consider it.

See *Bowdoin Coll.* vs. *Merritt*, 75 Fed. 481.

The refusal of Judge Hawley to consider the objection at the final hearing was also clearly and fundamentally erroneous.

Ayres vs. *Wiswall*, 112 U. S. 190.

All these methods by which the question was raised, that the case was not a controversy between citizens of different states, were proper.

Morris vs. *Gilmer*, 129 U. S. 326.

Ayres vs. *Wiswall*, 112 U. S. 190.

4. The controversy in the case (Bowdoin College vs. Merritt) in which the decree sought to be reviewed was made.

It is plain, manifest, and undeniable that the controversy, and the only controversy, in the case was upon the question of the validity of the alleged title of the trustees Stanly and Purington and the survivor of them, to the property described in the bill, and that this was a controversy between, on the one side, the trustees Stanly and Purington and the survivor of them (citizens of the State of California) and, on the other side, those, (all of them citizens of the State of California) who were disputing that title, namely, the heirs or next of kin, the administrator, one of the residuary devisees and legatees, and the executor of the other residuary devisee and legatee, of the person from whom the trustees claimed to have derived the title in question.

That such was the controversy and the only controversy, is shown in the final decree itself. (Transcript pp. 224-228.)

And also in the original bill.

(Transcript, pp. 30–42.)

And also in the paper by which the trustees Stanly and Purington appeared and joined in the suit.

(Transcript, pp. 53–55.)

And also in the supplemented bills bringing additional defendants into the suit from time to time.

(Transcript, pp. 97–116; 122–179; 194–215.)

And also in each petition of intervention.

(Transcript, pp. 46–53; 62–72.)

And in the entire record of the suit (*Bowdoin College* vs. *Merritt*) in which the decree sought to be reviewed. (Transcript, pp. 16–228.)

That such was the controversy, and the only controversy in the case, is expressly stated by Judge Hawley in his opinion on overruling the demurrer to the original bill. We refer particularly to the following language (54 Fed. at p. 60):

> " It is claimed by defendants that the bill fails
> " to state a cause of action for removing a cloud
> " on the title of the trustees, or for quieting the
> " title. The complainants in this action are not
> " seeking this relief upon the ground that they
> " have any legal title to the property to be quieted.
> " What they do claim is that the title and possession
> " of the property is in the defendants Stanly and
> " Purington, and that it is held by them in trust
> " for complainants, and for their benefit; and it is
> " this title and this possession which it is sought
> " in this suit to have quieted, and the cloud created
> " thereon by the acts of the defendants J. P. and
> " F. A. Merritt removed therefrom. If the bene-
> " ficiary of a trust is allowed to go into court to
> " enforce the performance of the trust and to pro-

" tect the trust property, then it must necessarily
" follow that he is entitled to the advantage and
" benefit of every position which could be taken or
" maintained by the trustees themselves if they
" had instituted the suit in their own names. It
" would be idle to hold that the cestui que trust
" could maintain an action to 'enforce the per-
" 'formance of the trust', and then to declare that
" in order to remove or dissipate any cloud upon
" the title to the property, or to do any other act
" or procure any decree necessary for the enforce-
" ment of the trust, it must first appear that he
" has a legal title to the property. The suit, in
" my judgment, is sustainable upon the ground
" that the beneficiaries of the trust are entitled
" to the same rights, privileges, and decrees that
" their trustees would have been entitled to if the
" suit had been instituted in their own names.
" The trustees had the right to bring the suit,
" and, if brought by them, full relief could have
" been granted. They refused to do so. The ben-
" eficiaries under the trust therefore claim the
" right to do what the trustees have declined to
" do; any judgment or decree which they may be
" able to secure will simply be such as the trus-
" tees would have been entitled to if they them-
" selves had instituted the suit."

That such was the controversy in the case was also stated by Judge McKenna in his opinion on overruling the plea and the motions to dismiss the suit We refer particularly to the passage already quoted where it is said (63 Fed. 214):

* * * " and it must be conceded that the
" bill shows and the evidence establishes that the
" real interests of Bowdoin College and Stanly
" and Purington [the trustees] are identical."
* * *

That such was the controversy in the case was also stated by Judge Hawley in his opinion on the final hearing. We refer particularly to the following lan-language (75 Fed. 481–482):

> * * * "This is a suit in equity to quiet title "to certain property. * * *
>
> "The main question for decision, under the "issues raised by the pleadings and presented by "the testimony, is whether a decree should be "given against James P. Merritt, Catherine M. "Garcelon's next of kin, against Harry P. Mer-"ritt, her residuary devisee and legatee, and "against George W. Reed, her administrator, [*i.e.*, "not against Stanly the trustee] declaring valid "a deed of real estate of the value of $750,000, "and a conveyance of personal property of the "value $500,000, and a declaration of trust, all "being parts of one instrument and embracing all "her property except $14,000, alleged to have "been made by her April 21, 1891, to John A. "Stanly, her attorney-at-law and legal adviser, "and Stephen W. Purington, her general busi-"ness manager and agent, as trustees." [*i. e.*, a decree in favor of the trustees.]

See transcript p. 96.

5. To Ascertain Whether the Case Was a Controversy Between Citizens of Different States, the Actual Truth Only is to be Considered.

The fact that the trustees Stanly and Purington are named with the defendants in the title to the bill, or in the pleadings, is without avail to sustain the jurisdiction. In determining whether the case is a controversy between citizens of different States, the trustees Stanly and Purington are to be assigned to their true

place, and it is their citizenship, on the one side, and not that of the beneficiaries, that is to be considered. The case is to be considered solely as a controversy between, on the one side, the trustees Stanly and Purington (citizens of the State of California) and, on the other side, the persons (citizens of the State of California) against whom it was the purpose of the suit to quiet the title of the trustees, namely, James P. Merritt and Frederick A. Merritt, Catherine M. Garcelon's next of kin, Prather and Dargie, alleged to be their confederates, Harry P. Merritt, her residuary devisee and legatee, George W. Reed, her administrator, and O. C. Miller, the executor of Stephen W. Purington, her other residuary devisee and legatees. That the parties are to be so arranged, regardless of the manner in which they are formally arranged as nominal plaintiffs or defendants in the pleadings, is the settled law. The case was a controversy, not between citizens of different States, but between citizens of the same State. It was solely a controversy between citizens of the State of California, and not within the jurisdiction of a United States Circuit Court.

Act of Congress of March 3, 1875, Section 1 (as amended Aug. 13, 1888) 25 Stats. 433.

"Suits * * * in which there shall be a "controversy between citizens of different States."

Act of March 3, 1875, Sec. 5: 18 Stats. 470.

(The section is printed on p. 56 of this brief.)

Commissioners of Arapahoe Co. vs. *Kansas Pac.*

Ry. Co., 4 Dill 280-281, 281, 283 (~~1885~~ 1877) (by Justice Miller).

Removal Cases, 100 U. S. 468-469 (1879).

Pacific Railroad vs. *Ketchum*, 101 U. S. 289, 290, 291-2, 293, 297-8 (1879).

Ayres vs. *Wiswall*, 112 U. S. 190, 191, 192 (1884).

Thayer vs. *Life Association*, 112 U. S. 719 (1884).

New Jersey Cent. R. R. vs. *Mills*, 113 U. S. 256 (1885).

Peper vs. *Fordyce*, 119 U. S. 471 (1886).

Barry vs. *Mo. K. & T. Ry. Co.*, 27 Fed. 2 (1886).

Blacklock vs. *Small*, 127 U S. 96, 98, 99 (1887).

Bland vs. *Fleeman*, 29 Fed. 669 (1887).

Belding vs. *Haines*, 37 Fed. 817 (1887).

Covert vs. *Waldron*, 33 Fed. 312 (1888).

Rich vs. *Bray*, 37 Fed., 273, 279 (1889).

Shreveport vs. *Cole*, 129 U. S. 44 (1889).

Cilley vs. *Patten*, 62 Fed. 498-499 (1894).

Pennoyer vs. *McConaughy*, 140 U. S. 11-12.

The essential fact making the case not a controversy between citizens of different States and not within the jurisdiction of the Court, was recognized and stated by Judge McKenna. We refer to the following language in the passage above quoted :

> * * * " it must be conceded that the bill " shows * * * that the real interests of Bow- " doin College and Stanly and Purington [the " trustees] are identical" * * *
>
> *Bowdoin Coll.* vs. *Merritt*, 63 Fed. 214.

That such is the legal effect of the fact thus stated by Judge McKenna, see the authorities last cited. The following are extracts from some of the decisions:

* * * "the fact that he is placed as defend-
"ant, instead of plaintiff, in a suit in chancery,
"never changes his relation to the controversy in
"the case, and it is very clear that the interest of
"the Denver Pacific Railway Company is the
"interest of the plaintiffs, that their interests are
"identical."

Comrs., &c. vs. *Kans. Pac. R. R. Co.*, 4 Dill 277, (by Justice Miller).

"The interests of the Nebraska Cilley and the
"New Hampshire Cilley and Dearborn lie in the
"same direction."

Cilley vs. *Patten*, 62 Fed. 498.

"The Court not only may, but most assuredly
"must, look to the real interests of the parties."

Id.

"Federal jurisdiction is not founded in fiction."

Id.

"The Court defines the controversy."

Id.

"The Union Trust Company is a necessary
"party to the suit. * * * No relief is sought
"against this defendant by the complaint. Its
"interests and those of the complainant are not
"adverse, but are identical."

Barry vs. *Mo., K. & T. R. Co.*, 27 Fed. 2.

"Her interests, as appear from the bill, are in
"harmony with those of the complainants. She
"is a necessary party," &c.

Rich vs. *Bray*, 37 Fed. 273.

" It is * * the duty of the Court, under the " law as it now stands, in passing on a question " of jurisdiction, * * * to arrange the parties " to the suit according to their interests in the " controversy."

Bland vs. *Fleeman*, 29 Fed. 669.

" Their interest in the result of the suit is iden- " tical with the interest of the plaintiffs."

Id.

" This proposition is evidenced by the plead- " ings."

Id.

" There must be a unity of interest, not merely " in the subject matter of the action, but also in " the relief sought."

Belding vs. *Haines*, 37 Fed. 817.

" The mortgage was a unit."

Blacklock vs. *Small*, 127 U. S. 104.

" The debt was a unit."

Ayres vs. *Wiswall*, 112 U. S. 187.

So here, the cause of action alleged in the bill is a unit.

" The relief asked in the suit must necessarily " be for the benefit of Helen Robertson Blacklock, " as well as for the benefit of the plaintiffs * * * " The suit is therefore shown to be one substan- " tially by and for the benefit of Helen Robertson " Blacklock."

Blacklock vs. *Small*, 127 U. S. 96.

" Although Wiswall did not contest the amount " of the claim of the complainants as set out in " their bill, Frederick S. Ayres, one of the joint

" debtors did; and if he succeeds in his defense, it " will of necessity enure to the benefit of Wiswall."

Ayres vs. *Wiswall*, 112 U. S. 187.

" The 5th section of the Act of March 3, 1875, " makes it the duty of the Court," etc.

Id.

* * * " the parties placed on different " sides of the matter in dispute according to the facts," etc.

Removal Cases, 101 U. S. 289.

* * * " The New Jersey corporation is in no " sense a merely formal party to the suit, or a " party in the same interest with the plaintiffs " * * * All the parties on one side of the " controversy not being citizens of different States " from all those on the other side, the citizenship " of the parties did not bring the case within the " jurisdiction of the Circuit Court."

Other passages of like import may be seen in the various authorities cited.

It is the citizenship of the trustees, Stanly and Purington, and not of their beneficiaries, that was to be considered.

This also is the settled law.

Comrs. of Arapahoe Co. vs. *Kansas Pac. Ry. Co.*, 4 Dill. 280-281, 281, 283.

Pac. R. R. Co. vs. *Ketchum*, 101 U. S. 289.

Blake vs. *McKim*, 103 U. S. 336.

Thayer vs. *Life Association*, 112 U. S. 717.

N. J. Central R. R. Co. vs. *Mills*, 113 U. S. 249.
Peper vs. *Fordyce*, 119 U. S. 469.
Barry vs. *Mo. K. & T. Ry. Co. Co.*, 27 Fed. 2.
Construction Co. vs. *Cave Creek*, 155 U. S. 283.

That the trustees, and not the beneficiaries, are the persons whose citizenship is to be considered, would follow because the trustees alone could maintain the suit to quiet their title, the presence of the beneficiaries as parties being utterly immaterial.

Bowdoin Coll. vs. *Merritt*, 54 Fed. 60 (By Judge Hawley).
Dodge vs. *Tulleys*, 144 U. S. 451 (where it is held that the citizenship of the beneficiary is immaterial.)
Coal Co. vs. *Blatchford*, 11 Wall. 172 (where the same ruling is made).

It would follow, too, from the rule that the trustees are the only necessary parties defendant in a suit to set aside the trust, the presence of the beneficiaries as parties being utterly immaterial.

Vetterlein vs. *Barnes*, 124 U. S. 169.
Kerrison vs. *Stewart*, 93 U. S. 160, 161.
Shaw vs. *R. R. Co.*, 100 U. S. 605.
Barnafee vs. *Williams*, 3 How. 574.
Knapp vs. *R. R. Co.*, 20 Wall. 117.
Mallow vs. *Hinde*, 12 Wheat. 193.
Coal Co. vs. *Blatchford*, 11 Wall. 172.

So exclusively does the cause of action belong to the trustee, that when the trustee is barred by the statute of limitations, every *cestui que trust* is likewise barred,

even though an infant.

Patchett vs. *Ry. Co.*, 100 Cal. 505.
Meeks vs. *Olpherts*, 100 U. S. 564, 569.

The record shows that the trustees Stanly and Purington were in actual fact plaintiffs in the suit.

The bill prayed for process to bring in the actual defendants, but omitted the names of the trustees from among those to be so brought in (Tr. p. 42). Here was a confession that the trustees were not in truth defendants.

Equity Rule 23.

No process was served on the trustees or either of them (Tr. pp. 45–46). They appeared voluntarily and took part as plaintiffs in the suit (Tr. pp. 53–55).

The omission to file any replication to the paper in which the trustees appeared and joined in the suit, was an adoption of that paper as a part of the bill.

Story Eq. Pl. Sec. 877.

And if the paper so filed by the trustees had been in truth an " answer ", as it was named by them, the failure to file any replication thereto entitled them to a dismissal of the suit. That they did not dismiss it was palpably because it was in truth their suit.

Equity Rule 66.

These, however, are but specific illustrations of what appears throughout the record.

Section 5 of the Act of March 3, 1875 [cited above], is as follows (18 Stats. 470):

> " That if, in any suit commenced in a Circuit " Court or removed from a State Court to a Circuit " Court of the United States, it shall appear to the " satisfaction of said Circuit Court, at any time " after such suit has been brought or removed " thereto, that such suit does not really and sub- " stantially involve a dispute or controversy prop- " erly within the jurisdiction of said Circuit Court, " or that the parties to said suit have been improp- " erly or collusively made or joined, either as " plaintiffs or defendants, for the purpose of cre- " ating a case cognizable or removable under this " act, the said Circuit Court shall proceed no fur- " ther therein, but shall dismiss the suit, or " remand it to the court from which it was removed, " and shall make such order as to costs as shall be " just."

The words in this act " if * * * it shall appear to " the satisfaction of said Circuit Court " are satisfied whenever it appears as a matter of law, the court being but the mouthpiece of the law.

Osborne vs. *Bank of U. S.*, 9 Wheat. at p. 366 (by Ch. J. Marshall);

Coke's Inst. on 29th Chapter of Magna Charta 56 (on *Rectum vel Justiciam*) Justiciam vel Rectum)

Wood vs. *Strother*, 75 Cal. 546.

Authorities cited on pp. 49–50 of this brief.

6. The Authorities Cited in Bowdoin Coll. vs. Merritt, 63 Fed. 214-215.

We here refer to the opinion of Hon. Joseph

McKenna, Circuit Judge, given on overruling the plea and the motions to dismiss the suit. On pages 214–215, certain decisions are cited (among them *Detroit* vs. *Dean* 106 U. S. 537) as raising

> " the seemingly natural inference that if the " refusal [of the trustees to sue] had not been col- " lusive, jurisdiction would have been entertained."

We submit that in none of the cases there cited was such a point raised, or considered, or included, even by implication, in the decision.

The rule is fundamental, and the reason upon which it is founded obvious, that no decision is authority upon any point not actually mentioned and considered, even though the point is necessarily involved in the case.

Rex vs. *Wilkes*, 4 Burr. 2546 (by Lord Mansfield.

Entick vs. *Lord Carrington*, 19 Howell's State Trials 1068 (by Lord Camden).

United States vs. *Sanges*, 144 U. S. 310, 317.

Cross vs. *Burke*, 146 U. S. 87.

United States vs. *More*, 3 Cranch. 157.

Anderson vs. *Hancock*, 64 Cal. 455.

7. The Entire Record of the Case to be Examined.

The entire record of the suit in which the decree sought to be reviewed was made including all the pleadings and proceedings, but excluding the evidence, is to be examined for the error in law to be remedied upon the bill of review.

Story Eq. Pl. §407.

Putnam vs. *Day*, 22 Wall. 60.
Shelton vs. *Van Kleek*, 106 U. S. 532.
Buffington vs. *Harvey*, 95 U. S. 99.
Whiting vs. *U. S. Bank*, 13 Pet. 2.
Dexter vs. *Arnold*, 5 Mason 303.
Enochs vs. *Harrelson*, 57 Miss 465.
Authorities cited on pp. 49–50 *supra*.

8. There is error in law apparent upon the face of the decree unless the requisite diversity of citizenship affirmatively appears.

Thayer vs. *Life Association*, 112 U. S. 20.
Grace vs. *Am. Central Ins. Co.*, 109 U. S. 278.
Continental Ins. Co. vs. *Rhoads*, 119 U. S. 237.
Stuart vs. *Easton*, 156, U. S. 46.

To sustain the jurisdiction the record must show a controversy wholly between citizens of different States.

Smith vs. *Lyon*, 133 U. S. 315.
Commissioners, etc. vs. *Kans. P. Ry. Co.* 4 Dill. 277.

9. Where the Error in Law Affirmatively Appears in the Decree.

It is error of law apparent on the face of the decree sought to be reviewed where, as in the case here, the pleadings, decree and entire record show affirmatively that the case was not a controversy between citizens of different States, and not within the jurisdiction of the

Court. Such error is to be remedied by a bill of review.

Story. Eq. Pl. §405.
Ketchum and Wife vs. *Farmers' Loan and Trust Co.*, 4 McLean 1.
Miller vs. *Clark*, 52 Fed. 900.
Gregor vs. *Molesworth*, 2 Ves. Sr. 109.
Whiting vs. *U. S. Bank*, 13 Peters 6.
Authorities cited on pp. 49–50 *supra*.

We respectfully ask that the decree appealed from be reversed.

RODGERS, PATERSON & SLACK,
Counsel for Appellants.

Feb. 11, 1899.